SUPREME COURT, U. S.

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No. 804

IN THE

Supreme Court of the United States

October Term, 1961

WARREN R. NEELY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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No.

WARREN R. NEELY, *Petitioner,*

v.

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PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals of February 26, 1962.

OPINION BELOW

The opinion of the court below (Appendix, *infra*) is not yet reported.

JURISDICTION

The judgment of the court below was entered, as noted above, on February 26, 1962. This was an appeal to that court in a federal criminal case instituted under 18 U.S.C. Sec. 1001 (the false statement statute), and this Court has jurisdiction to review the Court of Appeals under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution under 18 U.S.C. Sec. 1001 (the false statement statute), the perjury standard of proof applies?

2. As a subsidiary, but distinct portion of the first question, whether in an 18 U.S.C. Sec. 1001 case where there is a dispute as to whether an alleged false statement was in fact ever made, there must be some confirmation of the making of this statement beyond the testimony of one person who alleges he heard the statement?

3. Whether under 18 U.S.C. Sec. 1001 the "knowingly and wilfully" element of the statute is properly applied by a jury instruction that no evil intent is required to be shown and that wilful means no more than that the forbidden act is done deliberately and with knowledge?

STATUTE INVOLVED

18 U.S.C. Sec. 1001 is as follows:

"Statements or entries generally

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, ficticious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, ficticious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 947."

STATEMENT

Petitioner is a farmer working in the vicinity of Phoenix, Arizona. (I T. 155)* In 1954 he leased a section of land. One instrument had a lease agreement with option to purchase, and provided both for the lease and for the option to purchase the land at the end of three years (Exhibit 7).

In 1957 before the option was exercised, petitioner was called in to discuss his taxes for the year 1955 with a revenue agent. The agent met with petitioner in the presence of petitioner's accountant at the latter's office on July 17, 1957. (I T. 79, 165). Extended conversation of at least one and one-half hours (I T. 96) followed, unsworn and unrecorded.

Since the entire case turns on this conversation, we pause for details. According to the agent when he testified four years later, with no notes to refresh him other than the records of where he had spent his days, (I T. 89-90) he asked the petitioner whether the lease had contained an option and petitioner said No. (The agent was concededly hard of hearing and had been for some years prior to trial, though he said he had not been thus handicapped as far back as the relevant conversation.) (I T. 88). According to the petitioner, he was asked for a copy of his lease but was not asked whether it contained an option (I T. 168). The accountant, who appears to have been a thoroughly neutral witness, testified that he could not recall whether the agent asked about the option, though he testified that in their lengthy period of working together, the

*The transcript is still in the three pamphlets which were produced by the reporter at trial and will be identified as I T., II T., and III T., respectively.

Government agent never asked him whether there was any option in the lease (I T. 129-130, 133, 141).

There is thus conflict as to whether the agent asked questions about the option. To supply the request by the agent, petitioner had a new copy of the lease made up which omitted the option, and this document he gave to the agent (I T. 170-171). He was aware that the existence of the option might involve him in "controversy" if it were exercised because his accountant had told him so (I T. 38). Since at this time he did not know whether he would exercise the option, he concluded that he would be borrowing trouble needlessly if he became involved in a dispute over the option at that time. In petitioner's view of it, the original document was a lease *and* option. He was asked to furnish his lease and was not asked for his option, and he furnished what he was asked for (I T. 172).

The charge is that petitioner violated 18 U.S.C. Sec. 1001 twice, first when he allegedly spoke falsely to the agent at the July 17 meeting concerning the existence of the option, and second when he handed the agent the lease form without the option.

1. Both counts depend on what Neely was asked for. The sole evidence of this was the agent's statement, met with by the flat denial by the petitioner and the non-recollection by the only other person present, the accountant. Petitioner appropriately moved for acquittal on the ground that the Government had not sustained its burden of proof. This motion was denied in the trial court, and has been affirmed.

2. Over appropriate objection, the trial court instructed that,

> "You are further charged that the word 'knowingly' means with knowledge and that wilfulness

> is an element of the offense charged and is necessary for the Government to prove beyond a reasonable doubt that the defendant wilfully and knowingly submitted a false statement or document. To prove this element it is not necessary that the Government prove that the defendant in fact had an evil intent. The word 'wilful' means no more than that the forbidden act is done deliberately and with knowledge."

The defendant excepted to the giving of this instruction on separate grounds, the first being the Court should have instructed that evil intent was an element of wilfulness and the second, that in any case the Court erred in saying that wilfulness "means no more than that the forbidden act is done deliberately and with knowledge." The Court of Appeals has affirmed the giving of this instruction.

3. Petitioner was convicted and was sentenced to ten months on each count, to run concurrently, and to separate fines of $1,000 on each count.*

4. The case was duly presented to the Court of Appeals on the basis of the matters outlined above and other points which are not brought here. That court reaffirmed its earlier stand that the two witness or corroboration rule of the perjury cases did not apply in false statement cases. On the question of whether, when the making of a statement itself was in issue, any more testimony was required to show its making than the testimony of the Government agent, the Court of Appeals held that this was enough. It also approved the contested instruction.

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*The court below mentions the concurrent sentences but not the separate fines.

REASONS FOR GRANTING THE WRIT

1. The question of whether the perjury standard of proof shall apply to the false statement statute is so important that we believe that this Court has at least three times granted certiorari to reach that question. Each time an intervening circumstance has kept the Court from reaching it. The question is now clearly and sharply here.

In *Marzani v. United States*, 168 F.2d 133 (D.C. Cir. 1948), affirmed by an equally divided Court, 335 U.S. 895, 69 Sup.Ct. 299, 93 L.Ed. 431 (1949), we believe that this was a relevant issue; at least the Court below in the instant case construes it as a precedent to that effect. In *Gold v. United States*, 237 F.2d 764, 766 (D.C. Cir. 1956), the Appeals Court divided 4 to 4. This was a major issue in that case and Judge Bazelon in a separate opinion fully developed the view that the perjury standard should apply. This Court granted certiorari and reversed on other grounds, 352 U.S. 985, 986, 77 Sup.Ct. 378, 1 L.Ed.2d 360 (1957). Mr. Justice Clark, dissenting, noted that among the "other important questions" in the case was the issue of "the applicability of the perjury rule of evidence to the false statement statute." In *Travis v. United States*, 269 F.2d 928 (10th Cir. 1959), Judge Murrah, dissenting, expressly aligned himself with the view of Judge Bazelon. This Court reversed, 364 U.S. 631, 81 Sup.Ct. 358, 5 L.Ed.2d 340 (1961) on the ground of improper venue, and so did not reach the question here involved.

This Court has thoroughly re-examined and upheld the applicability of the two witness or corroboration rule in perjury cases, *Weiler v. United States*, 323 U.S. 606, 65 Sup.Ct. 548, 89 L.Ed. 495 (1945). The Seventh,

Ninth, and Tenth Circuits have declined to apply the rule to the false statement cases, see e.g., the instant case for Ninth Circuit; *United States v. Killian*, 246 F.2d 77 (7th Cir. 1957), and *Travis v. United States*, *supra*, for the Tenth Circuit. The District of Columbia Circuit, witness the *Gold* case, *supra*, has not been able to make up its mind. We respectfully submit that the weight of the argument is with Judge Bazelon and Judge Murrah.

The major distinctions between the false statement and the perjury cases are that the false statement statute carries a larger fine than does the perjury statute, and the perjury applies only to statements under oath while the false statement statute is not thus restricted. *Cf.* 18 U.S.C. Sec. 1001 and Sec. 1621. Every consideration which called for the result in *Weiler* calls for the same rule here. Various justices of this Court have commonly regarded the matters as interchangeable—see for analysis the opinion of Judge Bazelon in *Gold, supra*. The determination of the issue, as said by Mr. Justice Clark in *Gold*, is clearly important.

2. The situation in the instant case is worse than the perjury cases, worse than *Marzani*, worse than *Travis*, worse than *Gold*. In those cases, the real issue is the proof of the falsehood—i.e., the proof of whether the statement is true or is false. But in the instant case, the question is whether the statement in issue was ever made at all. No one doubts that if this question was ever asked and answered as the agent says that it was, that it was answered falsely. The issue, rather, is whether the question was ever asked and thus answered in the first place.

This question does not arise in the perjury cases, because by definition the witness is sworn and there is usually a record or witnesses to what he said. Even in the false statement cases, if the alleged false statement is written, the question of whether or not the assertion was made becomes indisputable.

This case extends the false statement statute into the area of completely unrecorded conversations between Government agents and private individuals, totally uncorroborated by any witness or other evidence. This is, bluntly, tyranny in the extreme. The number of conversations between some Government agent and some citizen each year must run to the hundreds of thousands. Here, four years after the event a Government agent of dubious hearing plucks from a long conversation one alleged answer which he remembers with remarkable precision. If this is proof under Sec. 1001, then indeed a cheap instrument of oppression has been forged. For only one of many examples, what becomes of the double jeopardy or statute of limitations protection if a new prosecution can always be instituted on the totally unsupported statement of a Government agent that the defendant made a post-trial statement on the subject to him? Yet the court below has expressly held that, "The making of a false statement which is covered by Sec. 1001 can be proved by the testimony of the person to whom the statement is made even though such testimony is uncorroborated by other witnesses and even though such testimony is contrary to that of the defendant."

This result is thought to flow from the decision in *Marzani v. United States, supra*. We do not think so; we think that the serious issue in that case was not

whether the alleged statement was ever made, but whether it was true or false. However, the very circumstance that the court below can thus interpret the action by this Court, equally divided, in *Marzani*, is itself an indication of the importance of this matter and of the necessity of setting it right.

We respectfully submit that it is important to determine whether a person exposed to conversation with a Government agent may be put in the penitentiary because the agent, many years later with no corroboration at all, asserts that the individual made an erroneous statement of fact.

3. The instruction question is important and involves conflict. The statute expressly provides that a violator must "knowingly and wilfully" do what he does. On the facts here, the petitioner suffers more from the sin of being clever than from the sin of being wicked. Given his point of view, all he was asked for was the lease, and this he gave, acting on the not unreasonable philosophy that one gives the tax collector what he asks for and not what he doesn't. The defense asked for an instruction which would have put to the jury the question of whether the petitioner was being any more than evasive, as distinguished from wicked.

We contend that the assertion of the court below, that no "evil intent" is required in order wilfully to commit a felony, conflicts with *United States* v. *Murdock*, 290 U.S. 389, 54 Sup. Ct. 223, 78 L. Ed. 381 (1933). The latter case expressly holds, 290 U.S. 394-395:

> "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal

> statute, it generally means an act done with a bad purpose . . . without justifiable excuse . . . stubbornly, obstinately, perversely. . . . The word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act . . . .
>
> "This court has held that where directions as to the methods of conducting a business are embodied in a revenue act to prevent loss of taxes, and the act declares a wilful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime."

The dots above mark the elimination of a dozen supporting citations. The court below sought to avoid this rule by restricting it to tax cases, distinguishing a similar decision of the Ninth Circuit because it "involved violation of the income tax laws, not violations of Sec. 1001." But where the alleged violation of Sec. 1001 consists of an alleged attempt to evade taxes, we cannot see the difference.

The Fifth Circuit has apparently unwittingly been on both sides of the fence as to how to instruct in these 1001 cases. It approved the exact instruction used below in *McBride* v. *United States*, 225 F. 2d 249, 253 (5th Cir. 1955). Shortly thereafter in *Corcoran* v. *United States*, 229 F. 2d 295, 299 (5th Cir. 1956) it approved an instruction which added to the *McBride* formula that the defendant must be "conscious that what he was doing was unlawful." This, the Fifth Circuit said in *Corcoran*, was "in strict conformity with our holding in the *McBride case*." It is not in conformity—the addition of the consciousness of unlawfulness adds the *Murdock* element, which is pre-

cisely what was left out in the first Fifth Circuit case and in the instant case. We submit that the second sight of the Fifth Circuit was better than its first, and that the instant case, while in accord with *McBride*, conflicts with *Corcoran*, which is the better rule.*

Regardless of the misadventures of this instruction in the Fifth Circuit, we think that it conflicts with the Third Circuit ruling in *United States* v. *Quirk*, 167 F. Supp. 462, 463 (E.D. Pa. 1958), aff'd, 266 F. 2d 26 (3rd Cir. 1959) a 1001 case. By the combined opinions of the two courts, the Circuit largely adopting that of the District Court, the Third Circuit rule is that if the Government proceeds under Sec. 1001, it must separately and distinctly prove that the offending act is *both* wilfully *and* knowingly done. As was there held, the proof of wilfulness is a "greater burden" than the mere proof of knowledge and for this purpose, "the actual state of mind is an element in the crime upon which Congress could, and we think, did base a distinction." To define "wilful" as in the instant case to mean "no more than that the forbidden act is done deliberately and with knowledge" makes wilfulness coincide with knowledge. It eliminates any independent status for wilfulness as an element in the statute. This is precisely what the Third Circuit has said cannot be done.

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*We appreciate that the Fifth Circuit went back to its *McBride* formula and abandoned that in *Corcoran* in *McClanahan* v. *United States*, 230 F.2d 919, 924 (5th Cir. 1956). Perhaps we should say that the Fifth Circuit was right the middle time.

CONCLUSION

In respect to the quantum of evidence required in the 1001 cases, and the application of the perjury rule in the false statement situations, this case presents an important question which has not but should be settled by this Court. In respect to the instruction, the matter is important in the number of cases to be governed by it. Approval of the instruction conflicts with a decision of this Court, with a decision of the Third Circuit, and with one of maze of decisions in the Fifth Circuit.

The petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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March, 1962.

APPENDIX

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17,564 Feb. 26, 1962

WARREN R. NEELY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the District of Arizona

Before: HAMLEY, HAMLIN and BROWNING, Circuit Judges

HAMLIN, Circuit Judge:

Appellant, Warren R. Neely, appeals to this court from a conviction by a jury on each of two counts of an indictment charging him with violations of 18 U.S.C.A. § 1001.[1] The court imposed the same sentence upon each count and ordered that the sentences run concurrently. Jurisdiction is in this court pursuant to 28 U.S.C.A. § 1291.

When the evidence is viewed in the light most favorable to the government,[2] it shows the following facts. On December 14, 1954, appellant leased 1280 acres of land near Chandler, Arizona, for a term of three years at a rental of

[1] Title 18 U.S.C.A. § 1001 reads:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[2] Glasser v. United States, 315 U.S. 60 (1942).

$55,000 per year. The lease contained an option in favor of appellant to purchase the property which could be exercised between November 1, 1957, and December 15, 1957, for the sum of $165,000. In his 1955 tax return appellant claimed the sum of $55,000 as a business expense deduction upon his income. In 1957, before Neely had attempted to exercise the option in the lease, Internal Revenue Agent Albert was assigned to review Neely's tax return for 1955. He met Neely on July 17, 1957, in the office of and in the presence of one Campbell who was Neely's accountant. Albert told Neely that the main matter under discussion was the rental deduction of $55,000 taken by Neely. Albert testified that he asked Neely if the lease contained an option to purchase and that Neely answered that it did not. Albert testified that he then said "'Good', because if it had contained an option to purchase, then the lease might be considered as a purchase agreement, which in that case the rental deduction of $55,000 would not be allowed, but would be considered as a part payment of the purchase price." Neely assured Albert that there was no option to purchase clause in the lease. Albert told Neely that it would be necessary to obtain a copy of the lease agreement in order to substantiate his statement and in order that Albert could attach the copy to the body of his report. In that way the rental deduction could be allowed to Neely. Neely said that he would obtain a copy of the lease agreement. He then went to the attorney who had prepared the original lease and had the attorney prepare a new lease by copying all the original provisions except those which made reference to an option to purchase. In preparing this new document the attorney, at Neely's direction, made red marks around the provisions relating to the option to purchase in order to indicate what parts of the lease were to be deleted from the new "copy". The attorney testified that he suggested the omission of the notarized part of the lease since he didn't know any notary who would notarize the "copy" of the agreement made in 1957 which was antedated to 1954.

A few weeks later Albert again met Neely in his accountant's office. Neely gave Albert a copy of the newly prepared lease agreement which contained no reference to the option to purchase. After looking it over Albert said to Neely, "There doesn't seem to be any indication of an option here, therefore, I can allow the rental deduction and close the case."

Count 1 of the indictment charged appellant with having given to the Internal Revenue Agent the lease agreement which omitted the provisions of the option to purchase, and charged that appellant did "wilfully and knowingly conceal and cover up, by a trick and scheme, a material fact in a matter within the jurisdiction of the Internal Revenue Service of the United States Treasury Department, in violation of 18 U.S.C.A. § 1001."

Count 2 of the indictment charged that the appellant did "wilfully and knowingly make a false and fraudulent statement and representation in a matter within the jurisdiction of the Internal Revenue Service of the United States Treasury Department, in that he orally stated to Nathan Albert, Internal Revenue Agent, that there was no option to purchase involved in said NEELY's lease . . . *whereas, in truth* and in fact . . . NEELY well knew, the lease agreement in effect at the time such oral statement was made contained an option to purchase."

Appellant first contends that the court erred in failing to grant the motion for acquittal because the Government had failed to sustain its burden of proof. In making this argument appellant points out that Albert testified that in the initial conversation he asked appellant if the lease contained an option to purchase and that appellant denied that it did, but that appellant testified that no such question was asked him and that the other person present—his accountant—testified that he had no recollection of this occurrence. Appellant contends that the perjury rule requiring confirmation by two witnesses or corroboration in addi-

tion to one witness applies,[3] and that since Albert's testimony concerning his conversation with appellant is uncorroborated it is insufficient to support the charges made. It is admitted by appellant, however, that this court has held to the contrary on several occasions,[4] and that the Tenth Circuit has followed this circuit upon the same subject.[5] Relying on statements appearing in the dissenting opinion of the Tenth Circuit case,[6] the appellant urges us to reconsider our prior decisions on this point and to adopt a different view. This we decline to do. We adhere to our prior decision and we hold that the perjury corroboration rule does not apply to prosecutions under 18 U.S.C.A. § 1001. Fisher v. United States, 254 F.2d 302 (9th Cir. 1958); De Casaus v. United States, 250 F.2d 150 (9th Cir. 1957); Fisher v. United States, 231 F.2d 99 (9th Cir. 1956); Todorow v. United States, 173 F.2d 439 (9th Cir. 1949). See also United States v. Killian, 246 F.2d 77 (7th Cir. 1957) and Travis v. United States, 269 F.2d 928 (10th Cir. 1959), *rev'd on other grounds*, 364 U.S. 631 (1961).

In addition to his contention for the perjury corroboration rule the appellant argues that when a statement alleged to be in violation of section 1001 has not been made under oath and is proved only by the testimony of a single witness which testimony is controverted by the testimony of another witness there is insufficient proof of an offense under section 1001 since one witness' word is as good as another's. In other words the appellant argues that one oath (that of agent Albert herein) against another contrary oath (that of appellant) is not sufficient to prove that

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[3] Cf. Weiler v. United States, 323 U.S. 606 (1945).

[4] Fisher v. United States, 254 F.2d 302 (9th Cir. 1958);
Fisher v. United States, 231 F.2d 99 (9th Cir. 1956);
Todorow v. United States, 173 F.2d 439 (9th Cir. 1949).

[5] Travis v. United States, 269 F.2d 928 (10th Cir. 1959), rev'd on other grounds, 364 U.S. 631 (1961).

[6] Id. at 946.

the statement for which the appellant was indicted was made. We cannot agree. One witness' oath is not as good as another's if the jury disbelieves the one and believes the other.

In *Marzani v. United States*, 168 F.2d 133 (D.C.Cir. 1948), *affirmed by an equally divided court*, 335 U.S. 895 (1948), the appellant contended that the predecessor statute of section 1001 did not apply to statements made at a private conference which were not required to be made, which were not made under oath or which were not reduced to writing. The testimony of the only two witnesses (one of whom was the defendant) was conflicting. The court said:

> It is true, as the appellant says, that the statements were not under oath and were not stenographically transcribed; that the interview was at appellant's request; [and] that there were only two participants in the conference . . . . However, it appears with equal clarity that Mr. Panuch was appellant's superior in office, that he had requested appellant's resignation, and that the purpose of the interview was to afford the appellant an opportunity to discuss the requested resignation and the charges upon which it was based. The pertinent statute does not limit the offense to formal statements, to written statements, or to statements under oath. It applies to "any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States."[7]

Statements for which there can be convictions under section 1001 are not limited to those required to be made by law or regulation.[8] Since such voluntary statements made

[7] 168 F.2d at 141-142.

[8] E.g., Knowles v. United States, 224 F.2d 168 (10th Cir. 1955); Cohen v. United States, 201 F.2d 386 (9th Cir. 1953).

to government agents can be made under an infinite variety of circumstances and since many of these circumstances would undoubtedly include the making of false statements in the presence of only one person, there should be no prohibition against proof of the circumstances under which a false statement was made by the testimony of the person to whom the statement was made. That one person to whom a false statement is made can prove the making of the statement by his testimony clearly follows from the decisions which hold that the perjury corroboration rule does not apply to cases involving section 1001.[9] Furthermore, the individual witness' credibility is subject to the scrutiny of court and jury, and such testimony is not to be held insufficient to prove the fact merely because the defendant denies the truth of the testimony. Thus, we hold that the making of a false statement which is covered by section 1001 can be proved by the testimony of the person to whom the statement is made even though such testimony is uncorroborated by other witnesses and even though such testimony is contrary to that of the defendant.

Appellant next contends that the conviction under Count 1 of the indictment is against the weight of the evidence. There is no merit to this contention. Appellant argues that he was only asked to produce a copy of the lease and that nothing was said about a purchase option. He says that in light of this request he felt free to use a copy of the lease only. However, the request for the lease was made specifically for the purpose of substantiating the appellant's statement that the lease did not contain an option to purchase. Appellant went to his attorney to have a special "copy" of the lease drawn up, antedated and signed, which "copy" omitted all reference to the option to purchase. Moreover, the appellant admitted that he had the lease changed before supplying it to the agent in order, as he said, "to avoid a controversy with the Internal Revenue."

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[9] See note 4 supra.

The above facts and the record show that there was ample evidence to sustain the conviction on Count 1.

The next contention of the appellant is that the matters involved in each count of the indictment were not matters within the jurisdiction of the Internal Revenue Service.[10] First, he states that the agent in 1957 while investigating the appellant's 1955 tax return asked for a copy of the lease agreement "then in effect." He argues that the lease "then in effect" (in 1957) "was, jurisdictionally, no business of the agent", because the return for that year (1957) would not have been due until 1958. This argument is totally without merit. It overlooks, *inter alia*, that the tax return investigated was for the year 1955 and that the lease in question with its option to purchase was dated December 14, 1954, was for a three year term, and was "in effect" both in 1955 and 1957.

Secondly, appellant argues that because the Internal Revenue Code of 1954 authorizes agents to take testimony "under oath" the agent in this case had no jurisdiction (within the meaning of section 1001) to question the appellant while he was not under oath. The pertinent provisions of the Code are set forth in the margin.[11] We think that

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[10] See note 1 supra.

[11] Title 26 U.S.C.A. § 7601(a):

> The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owing or having the care and management of any objects with respect to which any tax is imposed.

Title 26 U.S.C.A. § 7602:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of

these sections gave ample authority to the Internal Revenue Agent to do what he did. While the agent was "authorized" to take statements under oath he was not required to do so.

Appellant next contends that the court erred in instructing the jury as follows:

> You are further charged that the word "knowingly" means with knowledge and that wilfulness is an element of the offense charged and is necessary for the Government to prove beyond a reasonable doubt that the defendant wilfully and knowingly submitted a false statement or document. To prove this element it is not necessary that the Government prove that the defendant in fact had an evil intent. The word "wilful" means no more than that the forbidden act is done deliberately and with knowledge.

Appellant admits that this exact instruction was approved in *McBride v. United States*, 225 F.2d 249 (5th Cir. 1955), but contends that "it conflicts with the better judgment even of that Circuit, and that it certainly conflicts with the rule in this Circuit" (relying on *Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958)). We cannot agree.

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any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

The Fifth Circuit has reaffirmed *McBride* in *Corcoran v. United States*, 229 F.2d 295 (5th Cir. 1956). In that case the appellant was charged with a violation of 18 U.S.C.A. § 1001. The district court refused appellant's request to instruct the jury that for an act to be wilfully committed (under section 1001)

> it must have been committed by the defendant with an evil intent, and with knowledge that it was unlawful, and with the specific intent on the part of the defendant to fraudulently conceal material facts in matters within the jurisdiction of the Veterans Administration.

The court stated:

> The requested charge insofar as it states that "in order for an act to be wilfully committed . . . it must have been committed by the defendant with an evil intent" was inapplicable in a case such as we here consider for the reasons stated in our opinion in McBride v. United States . . . .[12]

The court pointed out that the district court had instructed the jury that " 'for an act to be "wilful", within the purview of Section 1001, the person doing the act must then have known what he was doing and deliberately did such act, conscious that what he was doing was unlawful' ". The court then stated that "[t]his charge was adequate and entirely proper, and in strict conformity with our holding in the McBride case."[13]

Furthermore, we do not believe that *Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958), relied upon by appellant, requires that in a prosecution under section 1001 the jury should be instructed that "wilfulness implies a bad

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[12] 229 F.2d at 299.

[13] Ibid.

faith and an evil motive." *Abdul* involved violations of the income tax laws, not violations of section 1001. In that case prosecutions for violation of tax statutes were distinguished from prosecutions under different statutes. The court stated:

> The meaning of the word "wilfully" *as used in the tax statutes* has been considered in a number of cases and seems to have come to rest in this Circuit, as well as others, as meaning with respect to felonies, "with a bad purpose or evil motive." [Emphasis added. Citations omitted.][14]

But the court recognized that the word "wilfully" does not always mean the same thing. The court said:

> It is "a word of many meanings, its constructions often being influenced by its context. United States v. Murdock, 290 U.S. 389 . . . ."[15]

In *Spies v. United States*, 317 U.S. 492 (1943), the Supreme Court expressed the same view as to its variety of meanings. The Court there stated:

> It ["wilfully"] may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfullness. *But in view of our traditional aversion to imprisonment for debt*, we would not without clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. *We would expect willfulness in such a case to include*

[14] 254 F.2d at 293.

[15] Id. at 294.

> *some element of evil motive* and want of justification in view of all the financial circumstances of the taxpayer. [Emphasis added.][16]

We hold that in this prosecution under section 1001 use of the instruction of which the appellant complains was not error.

Appellant contends that the court erred in admitting into evidence exhibits 4 and 5. Exhibit 4 is a financial statement given by appellant to the Mesa Branch of the Valley National Bank which lists his assets and liabilities. Appellant contends that he was prejudiced thereby before the jury because the statement shows him to be "a financially successful man." This financial statement, however, contained an item listed as a personal property asset reading "Prepaid lease $55,000." At the trial the government was contending that the $55,000 which the appellant had claimed as a deduction for rental expense was really a part of the purchase price under the option to purchase; therefore, the government argues that it was not error to show that the appellant himself considered the $55,000 as an asset. We agree that there was no error. Exhibit 4 does not have a great deal of probative value, because it may well be proper accounting procedure to list a prepaid lease as a personal property asset whether or not there is an option to purchase. However, an objection that an item of evidence is subject to conflicting inferences goes to its weight rather than to its admissibility.[17] There was certainly no prejudice to the appellant.

Exhibit 5 was a so-called "offering sheet" made by an officer of the Valley National Bank as a memorandum of the information given to the bank at an interview with the appellant who was applying for a loan. The exhibit contained a statement made by the bank officer after a con-

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[16] 317 U.S. at 497-8.

[17] Cf. McCormick, Evidence § 152 (1954).

versation with appellant. This statement referred to the 1280 acres described in appellant's lease and option to purchase stating, "This was acquired on a lease purchase basis, the total consideration being $300,000 with $55,000 paid in advance and $55,000 payable on January 15, 1956 and 1957 and $45,000 on January 15, 1958." The bank officer had been called as a witness to testify to the conversation with appellant which formed the basis for the above statement. He was asked to refresh his recollection from the contents of the offering sheet which had been made in March, 1957. The banker testified that he had had a conversation with appellant in 1957 and that Neely had then told the bank that he had a lease on the real property in question which provided for a purchase option. When an objection to the admission of the memorandum was made by appellant the following proceedings took place.

> Q. Do you have the care, custody and control of this document as manager of the Mesa Branch of the Valley National Bank?
>
> A. Yes.
>
> Q. And was this statement here made in the ordinary course of business as a standard bookkeeping entry?
>
> A. It was made in the standard course of our credit files, yes.
>
> Q. And does this concern Warren R. Neely?
>
> A. Yes.

The document was then admitted in evidence over appellant's objection.

The Business Records Act, 28 U.S.C.A. § 1732, sets forth the business records exception to the rule against heresay evidence as follows:

> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any

act, transaction, occurence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business" as used in this section, includes business, profession, occupation, and calling of every kind.

While appellant concedes in his brief that exhibit 5 "is the kind of entry which is capable of being 'a memorandum or record of any act, transaction, occurrence, or event' ", he contends that it is not admissible as a business record. We do not agree. We believe that the excerpt of testimony set out above was sufficient foundation for the admission of exhibit 5 into evidence as a business record within the meaning of section 1732(a).

Appellant finally contends that exhibits 6, 7 and 8 were not admitted into evidence and should not have been allowed to go to the jury. Exhibit 6 was a photostat of a commission agreement between the owners of the property in question and the realtors who handled their deal with appellant. To this was attached, as Exhibit A, a photostat of the lease and option to purchase agreement dated July 20, 1954, between the owners and appellant.

Exhibit 7 was a photostat of the lease and option to purchase between the same parties dated December 14, 1954.[18]

[18] The December 14, 1954, lease and option to purchase was in all important particulars the same as the lease and option dated July 20, 1954, but it had been changed in some details not pertinent to this discussion.

Exhibit 8 was the original typewritten lease and option to purchase dated December 14, 1954, on which had been placed red lines around all references therein to the option to purchase.

Exhibits 6, 7 and 8 according to the reporter's transcript were marked for identification on the afternoon of March 29 during the testimony of Richard E. Johnson, the attorney who had prepared the lease and option agreements dated July 20, 1954, and the similar lease and option agreement dated December 14, 1954. Mr. Johnson testified that the appellant had signed the two lease and option to purchase agreements in his presence. Johnson further testified that in July, 1957, he had put the red marks on exhibit 8 at the direction of appellant "to eliminate the option to purchase portion of the agreement from the lease agreement" and that he had handed it to appellant to be typed.

On the following afternoon during the opening argument of the prosecution appellant's counsel brought to the attention of the court that the typed transcript did not contain any reference to exhibits 6, 7 and 8 having been admitted in evidence. Each of the exhibits, however, had attached to it the tab affixed by the clerk of the court showing that the exhibits had been "admitted and filed March 29, 1961." Counsel for the prosecution in reply stated,

> I specifically recall offering every single lease into evidence and furthermore it is marked by the court which is the best evidence of whether or not they are admitted.
>
> THE COURT: That is what the court ordinarily says .... They are marked in evidence and the court will consider them.

After the jury had retired to deliberate, it requested that the exhibits be brought to the jury room. Appellant's counsel again contended that the transcript did not show that they had been admitted in evidence, although he admitted that the clerk had asked him previously whether the ex-

hibits were in and that he had replied, "I guess they are, I think they are". The court then stated, "I will admit them now and then I will see whether that is the proper thing."

We can see no error in the action of the court in permitting these exhibits to go to the jury. Government counsel stated that he had a distinct recollection of their having been offered and admitted. They bore the stamp and signature of the clerk that they had been admitted. Appellant's counsel had replied to a question put to him by the clerk of the court that he believed that they were in evidence. In addition to all of the above, the court specifically admitted them just prior to the time they were given to the jury for inspection.

The court may in its discretion allow evidence to be admitted out of the ordinary order of proof where, for instance, its admission was overlooked by mistake or inadvertence.[19] Under the circumstances of this case we are unable to say that the trial court abused its discretion in admitting the items before they were sent to the jury. There can be no question that the lease and option to purchase agreement was admissible in its various forms. Moreover, we see no prejudice in the fact that the commission agreement between the seller or lessor and the realtors was attached to the lease agreement in exhibit 6.

An examination of the entire record discloses that there was substantial evidence to support appellant's conviction on each count of the indictment and that there was no prejudicial error.

Judgment affirmed.

(Endorsed) Opinion Filed Feb. 26, 1952.

FRANK H. SCHMID,
Clerk.

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[19] See generally 6 Wigmore, Evidence §§ 1876-81 (3d ed. 1940).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17564

Judgment

WARREN R. NEELY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the District of Arizona

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.
Filed and entered Feb. 26, 1962.